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Supreme Court, U.S.
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No. 07-

In the

Supreme Court of the United States

Kenneth Allen Goldblatt,

Petitioner,

-v-

Carey D. Ebert, Trustee,

Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Was the "late filing" of the petitioner's Brief which caused the court of appeals to dismiss the petitioner's appeal caused by court personnel rather than by the petitioner and is it a denial of due process to punish a blameless litigant for the mistakes or oversights of court personnel?

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Citations of Opinions and Orders

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit in *In the Matter of Kenneth Allen Goldblatt; Kenneth Allen Goldblatt v. Carey D. Ebert, Trustee*, Docket No. 07-10232, decided October 31, 2007, reaffirming the District Court's dismissal of the petitioner's untimely bankruptcy appeal, is set forth in the Appendix hereto (App. D - p. 33).

The published opinion of the United States Court of Appeals for the Fifth Circuit in *In the Matter of Kenneth Allen Goldblatt; Kenneth Allen Goldblatt v. Carey D. Ebert, Trustee*, Docket No. 05-10747, decided August 18, 2006, and reported at 203 Fed. Appx. 545, 548, affirming the District Court's dismissal of the petitioner's untimely bankruptcy appeal, is set forth in the Appendix hereto (App. C – p. 26).

The unpublished Order of Dismissal by the District Court for the Northern District of Texas at Fort Worth, in *Kenneth Allen Goldblatt v. Carey D. Ebert, Trustee*, Docket No. 4:04-CV-337-Y, filed February 5, 2005, dismissing the petitioner's appeal from the Bankruptcy Court to the District Court, is set forth in the Appendix hereto (App. A – p. 22).

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit in *In the Matter of Kenneth Allen Goldblatt; Kenneth Allen Goldblatt v. Carey D. Ebert, Trustee*, Docket No. 07-10232, decided November 28, 2007, denying the petitioner's combined petition for rehearing or for rehearing en banc, is set forth in the Appendix hereto (App. E – p. 36).

Basis for Jurisdiction in this Court

The decision of the United States Court of Appeals for the Fifth Circuit reaffirming the District Court's dismissal of the petitioner's appeal from the Bankruptcy Court, was entered on October 31, 2007; and its further order denying the petitioner's timely filed combined petition for panel rehearing or for rehearing en banc was filed and decided on November 28, 2007 (App. E – p. 36).

This petition for writ of certiorari is filed within ninety (90) days of November 28, 2007. 28 U.S.C. Section 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

Constitutional, Statutory ar. l Rule Provisions Implicated by this Petition

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

United States Constitution, Amendment XIV, Section 1:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

28 U.S.C. Section 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Federal Bankruptcy Rule 8001(a):

An appeal from a judgment, order, or decree of a bankruptcy judge to a district court . . . shall be taken by filing a notice of appeal with the clerk within the time allowed by Rule 8002. An appellant's failure to take any step other than [the] timely filing [of] a notice of appeal does not affect the validity of the appeal but is ground only for such action as the district court or the bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal.

Federal Bankruptcy Rule 8002(a):

. . . .[T]he notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from.

Statement of the Case

The core substantive issue of this litigation in the original trial court – and in each and every forum in which the issues have since been addressed – is the value of a parcel of commercial real estate located in Grapevine, Texas, which provides the location for a lucrative burial vault manufacturing business.

In 1994, as a favor to friends, the petitioner Kenneth Allen Goldblatt ("the petitioner" or "Goldblatt") purchased a mortgage note in order to stop the foreclosure of this property in Grapevine, Texas, and to allow the co-executors of an estate owning the property additional time to sell the property for the estate's benefit. The business tenant of the property who had manipulated the property into foreclosure in the first place then sued the petitioner and others in a Texas probate court claiming that Goldblatt had conspired to interfere with its right to purchase the property. The tenant's suit prevented the co-executors from collecting the rents due on the premises and the petitioner was forced to foreclose on the equity of redemption underlying the mortgage note he held.

The Texas probate court eventually entered a summary judgment declaring that the petitioner's foreclosure had cut off the tenant's rights to purchase the property. However, the court on May 11, 2000, then issued an erroneous judgment markedly different from its earlier rendition finding that the petitioner had engaged in a civil conspiracy to interfere with the tenant's business operations, entering a permanent injunction which prevented the petitioner from interfering with those operations on property which the court had previously found – and reaffirmed in its final rendition – that the

petitioner still lawfully owns. It awarded the tenant money damages and erroneously declared the value of the subject real estate to be just $105,000.00 even in the face of appraisals of much higher value.

Once the state probate court litigation was completed, the tenant refused to pay a market-rate rent demanded by petitioner for use of his real estate; he accordingly began proceedings to evict the recalcitrant tenant. Simultaneously, the petitioner filed a Chapter 11 bankruptcy petition in federal bankruptcy court in order to protect the property from judicial foreclosure for the judgment debt while he appealed the flawed state court judgment. In its response to petitioner's appeal of the trial court's errors in the judgment itself, an intermediate appeals court in the State of Texas issued an unpublished opinion which ignored the inconsistencies and conflicts contained in the judgment and affirmed the judgment. The Texas Supreme Court refused the petitioner's plea to clarify the inconsistencies in this ruling.

Subsequently, the tenant filed an action in bankruptcy court to take the property from the petitioner by arguing that the property value set by the state trial court of $105,000.00 was not sufficient to allow the petitioner to successfully complete a voluntary plan of reorganization under Chapter 11, thereby forcing the petitioner into an involuntary dissolution under Chapter 7 of the Bankruptcy Code.

Because the bankruptcy court adopted the diminished value for the property of $105,000 as set by the state court, the petitioner's bankruptcy proceeding was transferred to Chapter 7 status. By this time, the tenant had been in possession of the property for over two years without paying any rent. When the Bankruptcy Trustee refused to

seek back rent from the tenant, the petitioner sought to have the Trustee abandon the claims to him by filing a Contested Matter. The Trustee refused and the bankruptcy court upheld the Trustee. Worse, the Trustee abandoned the subject real estate, allowing a judicial foreclosure by the tenant as a judgment holder.

On April 16, 2003, the bankruptcy court denied the petitioner's Motion to Compel the Trustee to Abandon Claim. A Motion for Rehearing and a New Trial was timely filed by the petitioner and then denied on August 5, 2003. The petitioner timely filed a Notice of Appeal on August 12, 2003. On August 20, 2003, the petitioner timely and properly filed his Designation of Record on Appeal. On August 24, 2003, he received a Clerk's Notice of Fees Due and paid the said fee on August 25, 2003. On March 31, 2004 Petitioner filed his 418-page Record on Appeal consisting of ten (10) numbered documents. On June 9, 2004, the District Court issued an Order to Show Cause why the petitioner had not filed his Appellant's Brief and ordering him to do so by June 23, 2004, if he desired to pursue his appeal.

During the pendency of the petitioner's suit against the Trustee to abandon the claims and his subsequent appeal to the District Court from the bankruptcy court's rulings affirming the Trustee's actions, the subject real estate sold at a constable's sale on May 12, 2004, for $320,800.00, a value more than three times the amount the tenant had been claiming for years that the property was worth, a value that invalidates all of the tenant's previous claims about the worth of the property and a value which substantiates the petitioner's repeated assertions that the property was capable

of funding his voluntary reorganization plan under Chapter 11 of the Bankruptcy Code.

On June 23, 2004, the petitioner filed his response to the District Court's Order to Show Cause of June 9, 2004, and attached to his response a copy of his Brief as Appellant. Petitioner also attempted to file his appellate brief as required by the Order to Show Cause, as well as a Motion to Supplement the Record of the Appeal to add the Constable's Deed to the record.

At the time the petitioner filed his response together with his appellate brief, the filing clerk told him that it was the District Court's policy not to file his brief until the court ruled on his Motion to Supplement the Record. The petitioner informed the filing clerk that his brief as appellant was being filed in response to an Order to Show Cause. The Clerk file-stamped the Brief on the back page as "Received" as of June 23, 2004 at 1:10 P.M. and informed the petitioner that the action (and stamp) would show that he had complied with the Court's Order to Show Cause and that the Brief would be filed by the Clerk once the District Court had acted on his Motion to Supplement the Record.

Petitioner specifically asked the Clerk if any other action on his or his attorney's part would be required to perfect the filing of his appellate Brief and the Clerk told him that the Clerk's Office would "take care of it" without any further action by him or his attorney once the Court had ruled on his Motion to Supplement the Record of the Appeal.

On June 28, 2004 the District Court issued an Order striking/un-filing the Motion to Supplement the Record because it did not contain a Certificate of Conference. On July 21, 2004, the petitioner's counsel re-filed the Motion with the

required Certificate of Conference. Petitioner's counsel also inquired about the refusal of the Clerk to file the petitioner's appellate Brief which had been appended to his response to the District Court's Order to Show Cause of June 9, 2004, stating that he had copies of the Brief "stamped as received by the Clerk's office on June 23, 2004, at 1:10 p.m." The Clerk's Office did not respond to this inquiry.

On September 16, 2004, the District Court issued its Order Granting the petitioner's Motion to Supplement Record. However, on February 25, 2005, the District Court issued another order dismissing in its entirety the petitioner's appeal to the District Court from the bankruptcy court's rulings affirming the Trustee's actions because his appellate Brief has not yet been filed and was "over nine months late" (App. A – p. 23).

On March 7, 2005, the petitioner timely filed a Motion for New Trial which recounted all of his actions in perfecting the Appeal and in filing his appellate Brief on June 23, 2004. In addition, the petitioner again filed his appellate Brief as the Appellant separately on March 7, 2005, and referenced this filing of the Brief in his Motion for New Trial.

On May 4, 2005, the District Court denied the petitioner's Motion for New Trial erroneously holding in part "the appellate brief never was filed separately as its own document. . ." and that the petitioner's recollection of events incident to the filing of his appellate Brief must be inaccurate since a Clerk would never refuse to file such a document. (App. B – p. 26 and C – p. 32) The Order also observed that "[t]he response to the show-cause order was not thereafter re-filed, and the appellant brief was never filed separately with the clerk" (App. B – p. 26 and C – p. 32).

In fact, the record clearly indicates otherwise, i.e., that the filing of the petitioner's Brief separately was confused by the actions of an employee of the Clerk's office and the failure of the Clerk's staff to file the Brief properly when it was proffered by the petitioner on June 23, 2004, and/or after the Motion to Supplement the Record was heard as the petitioner was informed that it would be. In either case, the petitioner is blameless but is suffering for the errors of employees/agents of the Clerk's Office over whom he has no control.

The Order also stated that the petitioner "has wholly failed to submit any evidence supporting his version of events, nor has he specifically identified the deputy Clerk who [sic] he alleges refused to file his brief or submitted a copy of the brief that he alleges was received-stamped on the back" (App. B – p. 26). In fact, however, the petitioner's Motion for New Trial included a complete copy of the Brief showing a Certificate of Service dated June 23, 2004, including a file stamp of the Clerk's Office as well as an "ORIGINAL" stamp with a filing Clerk's initials above this latter stamp. All of this was enough evidence to identify the file Clerk in question and allow the Court to identify in its files the originally-filed copy of the Brief with the "received" stamp on the back of the final page.

On June 1, 2005, the petitioner filed his notice of appeal. On August 18, 2006, the court of appeals for the Fifth Circuit affirmed the District Judge's dismissal of the petitioner's appeal and the denial his motion for a new trial (App. C – p. 33). In reaching this result, the court noted that while the petitioner's Brief was not separately filed strictly in accord with Bankruptcy Rule 8009(a), it "was filed [on June 23, 2004] as an

attachment within the extension delay" (App. C – p. 31). Moreover, it thought that "[a]rguably, Goldblatt initially did not willfully fail to file his brief" and noted that the Trustee had received the petitioner's Brief and was not prejudiced. (App. C – p 32).

However, the court concluded that the petitioner did not separately file his Brief in the wake of an order by the District Court on June 28, 2004, to "unfile" his response to the Order to Show Cause to which his Brief was appended (App. C – pp. 30-31). In addition, it found that the petitioner's failure to separately re-file his Brief until March of 2005 "demonstrates a certain stubbornness or willfulness sufficient to warrant dismissal" (App. C – p. 32).

On September 18, 2006, the petitioner filed a motion for rehearing in the bankruptcy court which was denied on October 2, 2006. He filed another notice of appeal with the bankruptcy court on October 20, 2006. In pursuit of the re-filing of the appeal to the district court, the petitioner's attorney contacted the District Clerk for the Fort Worth District who admitted that the original intake clerk made "a mistake" in un-filing the petitioner's separately filed brief and told the attorney that since the incident occurred, the procedure within the District Clerk's office had been changed.

On January 16, 2007, the District Court held a telephone hearing with the parties and the petitioner's appeal was dismissed (App. D – p. 35). The minutes of that hearing indicate that the petitioner's appeal was dismissed for "untimeliness of, *inter alia*, bankruptcy appeal, designation of record on appeal, and filing of appellate brief" (App. D – p. 36).

The petitioner appealed to the court of appeals for the Fifth Circuit for the second time on this single issue on February 15, 2007. In preparing his appellate Brief, the petitioner discovered that the designated documents of the Record on Appeal were never delivered to the District Clerk's Office and were still not a part of the file. Thus the reasons cited for the dismissal were erroneous and constitute an abuse of discretion on the part of the district court and gross negligence on the part of the Clerk Office.

Nevertheless, the court of appeals affirmed the dismissal of the petitioner's appeal because the notice of appeal he filed on October 16, 2006, was beyond the ten-day period allowed by Bankruptcy Rule 8002(a), and therefore untimely (App. D – p. 37). The court of appeals denied the Goldblatt's combined petition for rehearing or rehearing en banc on November 28, 2007 (App. E – p. 39) that demonstrated that the panel's understanding of the date of the dismissal order was in error (App. F – p. 41-48 *passim*).

Argument in Support of Allowance of the Writ

Imposing the Most Severe Sanction of Dismissal upon an Innocent and Faultless Litigant for the Oversight or Negligence of the Clerk's Office is a Violation of Due Process and Warrants the Granting of this Petition.

The District Court erroneously dismissed the petitioner's appeal for failure to file an appellate Brief when, in fact, the petitioner had filed copies of the Brief three separate times but had the separately filed Brief "un-filed" due to an

error by the Clerk's Office. The petitioner appealed the dismissal to the court of appeals which upheld the dismissal. The petitioner immediately re-filed his appeal which was then dismissed again for reasons not stated in the final judgment of the District Court but which served to deny the petitioner his day in court on the critical and important issues of this case, i.e., the value of a parcel of commercial real estate he owns in Grapevine, Texas.

The record indicates that the separate filing of the petitioner's Brief was confused by the actions of an employee of the Clerk's Office and the failure of the Clerk's staff to file the Brief properly when it was proffered by the petitioner for filing on June 23, 2004, and/or after the Motion to Supplement the Record was heard as the petitioner was informed that it would be. In either case, the petitioner is blameless but is suffering through the dismissal of his appeal for the errors of employees/agents of the Clerk's Office over whom he has no control and for whom he is not responsible.

This Court has repeatedly acknowledged that the federal courts have a "virtually unflagging obligation . . . to exercise [the] jurisdiction given them" by Article III and by federal legislation. *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 716 (1996). *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 821 (1976). *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964). *Wilcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909). *Cohens v. Virginia*, 19 U.S. 264 (1821).

In addition, this Court has the responsibility in its superintendency role over the federal courts and the federal system to formulate the

controlling rules for hearings and proof which precede the entry of default judgments and dismissals in order that those rules of procedure provide the parties with due process in their reach and result. *Klapprott v. United States*, 335 U.S. 601, 611 (1949) (Black, J.) citing *McNabb v. United States*, 318 U.S. 332, 341 (1943).

Goldblatt submits that imposing the most severe sanction of the dismissal of his appeal upon an innocent and faultless litigant such as himself for the neglect and oversight of the Clerk's Office in communicating with him about his appellate Brief – indeed, promising "to take care of" the filing for him after the District Court had ruled upon a pending motion – is at odds with fundamental fairness and denied him due process. While this Court has yet to rule on this precise question, as the tribunal with the final authority in how rules of civil procedure are implemented so that they provide fundamental fairness and due process to litigants, it should allow Goldblatt's Petition and take this opportunity to define with precision the kind of neglect by a third party which will be imputed to litigants in order to punish them with dismissal of their appeal for its commission.

This Court should therefore grant the petition and issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit and, ultimately, vacate and reverse this judgment and remand the matter to the United States District Court for the Northern District of Texas at Fort Worth, with instructions that the petitioner be given the opportunity to prosecute his claims against the Trustee in Bankruptcy Court and to reestablish the true value of his property in that forum; or provide the

petitioner with such other relief as is fair and just in the circumstances of this case.

Most actions taken by the parties' legal representative in the course of litigation are rightly and understandably imputed to those parties themselves since those who decide to retain a lawyer should be able to rely on that lawyer to tend to the legal business at hand in a manner consistent with their interests. The presumption is that the client has notice of all facts known to his lawyer-agent; and even the negligence of the parties' attorney will be imputed to those parties.

In *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-634 (1962), for example, Justice Harlan, writing for the Court's plurality, stated that plaintiff's counsel's unexcused failure to appear at a pre-trial conference in an auto tort case because of a scheduling conflict was reason enough to dismiss the

> action with prejudice under Fed. R. Civ. P. 41(b): [t]here is certainly no merit to the contention that dismissal of Petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."

Id. quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879). Accord, *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 396-397 (1993).

However, different considerations apply when the negligence or oversight is committed by third parties over which the litigant has no control or for whom he is not responsible. Pioneer involved a late filing by respondents in bankruptcy court beyond the bar date. *Id.* at 384. The Bankruptcy Rule 9006(b)(1) allowed such late filing if it were the result of "excusable neglect." *Id.* at 385. In rejecting the notion that the late filing by counsel could not be attributed to the clients, Justice White distinguished those cases of ordinary negligence by a party or his attorney under Rule 60(b)(1) from those cases under Rule 60(b)(6) demonstrating "extraordinary circumstances" beyond the parties' control. *Id.* at 393-394.

That is, as Justice White observed, "[b]ecause of the language and structure of Rule 60(b), a party's failure to file on time for reasons beyond his or her control is not considered to constitute "negligence." *Id.* citing *Klapprott*, 335 U.S. at 613-614. In this latter situation under Rule 60(b)(6), relief would be warranted if "the party is faultless in the delay." *Id.* at 393-394 citing *Ackermann v. United States*, 340 U.S. 193, 197-200 (1950).

Such is the case here. At the time the petitioner filed his response together with his appellate Brief, the filing Clerk told him that it was the District Court's policy not to file his Brief until the court ruled on his Motion to Supplement the Record. The petitioner informed the filing Clerk that his brief as appellant was being filed in response to an Order to Show Cause. The Clerk

file-stamped the Brief on the back page as "Received" as of June 23, 2004 at 1:10 P.M. and informed the petitioner that the action (and stamp) would show that he had complied with the Court's Order to Show Cause and that the Brief would be filed by the Clerk once the District Court had acted on his Motion to Supplement the Record.

Petitioner specifically asked the Clerk if any other action on his or his attorney's part would be required to perfect the filing of his appellate Brief and the Clerk specifically told him that the Clerk's Office would "take care of it" without any further action by him or his attorney once the Court had ruled on his Motion to Supplement the Record of the Appeal. None of these circumstances bespeak fault, negligence or oversight on the part of the petitioner. On this record, the petitioner was faultless in causing the delay relied upon by both the District Court and the court of appeals in order to justify the dismissal of his appeal.

Klapprott's language is instructive in this regard. There the petitioner, a naturalized citizen of the United States but an alleged German national, had been defaulted from having a denaturalization hearing because he had been incarcerated for four years by the government and was unable to obtain representation to defend against this denaturalization proceeding. 335 U.S. at 603; 614-615. In reversing the default judgment which had entered against him, this Court wrote:

> [A]ll petitioner has asked is that the default judgment be set aside so that for the first time he may defend on the merits. Certainly the undenied facts alleged justify setting aside the default judgment for that purpose. *Petitioner is entitled to a fair trial.* He

> has not had it. Fair hearings are in accord with elemental concepts of justice, and the language of the "other reason" clause of [Rule] 60(b) is broad enough to authorize the Court to set aside the default judgment and grant petitioner a fair hearing.
>
> *Id.* at 615 (emphasis supplied). See *United States v. Karahalias*, 205 F.2d 331, 335 (2nd Cir.1953) (Hand L., J.). Thus a party will not be held responsible – or sanctioned – for events beyond their control and for which they cannot justifiably be held responsible, especially when the sanction will deprive that party of a full and fair hearing on his legitimate claims.

In the wake of the Court's holdings in *Klapprott*, *Link* and *Pioneer*, five federal circuit courts of appeals as well as two federal circuits have agreed that the grossly negligent conduct by even a party's own attorney is the kind of "extraordinary circumstance" for which a faultless and unknowing litigant should not be held responsible and that relief from a judgment or dismissal entered for this reason should be allowed in order to give a party his day in court consonant with due process and fundamental fairness. *Greenspun v. Bogan*, 492 F.2d 375, 382 (1st Cir. 1974). *Carter v. Albert Einstein Med. Ctr.*, 804 F.2d 805, 806-808 (3rd Cir. 1986). *In re Virginia Info. Sys. Corp.*, 932 F.2d 338, 342 (4th Cir.1991). *Shepard Claims Serv., Inc. v. William Darrah & Assocs.*, 796 F.2d 190, 195 (6th Cir.1986).*Community Dental Services v. Tani*, 282 F.3d 1164, 1168-1171 (9th Cir. 2002). *L.P. Stewart, Inc. v. Matthews*, 329 F.2d 234, 235 (D.C. Cir.

1964). *Primbs v. United States*, 4 Ct. Cl. 366,370 (1984). See also *King v. Mordowanec*, 46 F.R.D. 474, 477-478 (D. R.I. 1969); *United States v. Cirami*, 563 F.2d 26, 34-35 (2nd Cir.1977).

A fortiori, where the negligent or inexcusable conduct is committed not by a party's attorney but rather by personnel in the Clerk's Office, conduct which causes a litigant's filed appellate Brief to be disregarded by the District Court because it was not filed in the proper form, it is the kind of "extraordinary circumstance" for which a faultless and unknowing litigant should not be held responsible and for which he should not be sanctioned with a default or the dismissal of his appeal.

The due process deprivation caused by sanctioning the petitioner with dismissal of his appeal in the circumstances here is severe. The petitioner's cause of action and his right to have his real estate valued properly both in the Texas state courts and in Bankruptcy Court is a valuable property right entitled to due process protection. *Board of Regents v. Roth*, 408 U.S. 564, 571-572 (1972). It cannot be taken away without notice and a hearing. *Id. Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

Due to the drastic sanction of dismissal, there has never been a full and fair hearing on the petitioner's claims for back rent coupled with the true valuation of the real estate. He has already adduced documentary proof (in the form of the Constable's Deed and other materials) that the property valuation found by the original trial court is grievously incorrect, and that error cascaded throughout this case to the continuing harm of the petitioner's property rights and has been aggravated by the ongoing errors that affected the

petitioner's procedural and substantive due process rights.

All of these facts turn on the issue of whether the tenant maintained any contractual rights to purchase the real estate after the petitioner's lawful foreclosure. The state probate trial court found – three times – that it did not. Its summary judgment provided succinctly that those rights had been extinguished in 1994. In its 1999 rendition, it refused to alter that proposition; and in its 2000 final judgment, it recognized the petitioner's property rights again. Yet its permanent injunction effectively transferred enjoyment, use and control of the property to the tenant in direct violation of the petitioner's clearly recognized property rights. This conflict has never been resolved and can only be resolved by this Court ordering a full and fair hearing on these competing claims consistent with due process.

To hold, as the courts below have held, that the inexcusable neglect of the Clerk's Office in communicating with the petitioner about his appellate Brief and then in failing to file same properly as it had promised to do, should now be visited on the petitioner in the form of a dismissal of his appeal is a denial of due process, is fundamentally unfair and runs counter to the sense of fairness underlying this Court's decisions in *Link*, *Klapprott*, and *Pioneer*. The result is also at odds with the emerging consensus among the lower courts that imposing this most severe sanction of dismissal upon an innocent and faultless litigant like the petitioner for the mistakes of others for whom he is not responsible is a violation of due process.

Justice Black's observations in his dissenting opinion in *Link*, 370 U.S. at 648-649, are apt:

> . . . I think it would be far better in the interest of the administration of *justice*, . . . to adopt the rule that no [litigant] is ever to be penalized, as this plaintiff has been, . . . unless notice is given to the [litigant] himself that such a threat hangs over his head. Such a rule would do nothing more than incorporate basic constitutional requirements of fairness into the administration of justice in this country . . . . [I]t is of very great importance to everyone in this country that we do not establish the practice of throwing litigants out of court without notice to them solely because they are credulous enough to entrust their cases to [others] whose names are accredited as worthy and capable by their government. *Id.* (emphasis in original). See *Ackermann*, 340 U.S. at 205 ("It does no good to have liberalizing rules like 60(b) if, after they are written, their arteries are hardened by this Court's resort to ancient common-law concepts.") (Black, J., dissenting).

Conclusion

For all of the reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit and, ultimately, to vacate and reverse this judgment and remand the matter to the United States District Court for the Northern District of Texas at Fort Worth, with instructions that the petitioner be given the

opportunity to prosecute his claims against the Trustee in Bankruptcy Court and to reestablish the true value of his property in that forum; or provide the petitioner with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

Frank P. Hernandez

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

KENNETH ALLEN GOLDBLATT

VS.

ACTION NO.
4:04-CV-337-Y

CAREY EBERT, TRUSTEE

ORDER OF DISMISSAL

This bankruptcy appeal was entered on this Court's docket on May 4, 2004, as indicated by the letter from the clerk transmitted to counsel for the parties the next day. As a result, Appellant's brief on appeal was due on May 19. See Bankr. R. 8009(a). As of the date of this order, Appellant's brief has not been filed. Appellant's brief is over nine months late. Inasmuch as this is not the first instance of Appellant's dilatoriness in prosecuting this appeal, the Court concludes that this appeal should be dismissed.[1] See *In re Quevedo*, 35 B.R. 117, 118-20 (D.P.R. 1983) (dismissing appeal where the brief was filed ten days late; noting that appellant also had been tardy filing his designation of contents for inclusion in the record and his statement of issues).

It is therefore, ORDERED that the appeal in this cause is hereby DISMISSED.

SIGNED February 24, 2005

Terry R. Means
United States District Judge

[1] When the record on appeal originally was transmitted to this Court, the bankruptcy court clerk noted that the record was deficient due to Appellant's failure to timely comply with Bankruptcy Rule 8006.

APPENDIX B
District Court Denial of New Trial
May 4, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

KENNETH ALLEN GOLDBLATT	§
	§ ACTION NO.
VS.	§ 4:04-CV-337-Y
	§
CAREY EBERT	§

ORDER DENYING MOTION FOR NEW TRIAL

Pending before the Court is Appellant's Motion for New Trial, which was filed in this cause on March 7, 2005. After review of the briefs submitted regarding the motion, the record in this cause, and the applicable law, the Court concludes that the motion should be denied.

Appellant complains about the dismissal of his appeal due to his failure to timely comply with Bankruptcy Rule 8009(a). As noted in the Court's Order of Dismissal filed on February 25, 2005, Appellant's brief was originally due on May 19, 2004, but had not been filed as of the date of the order of dismissal. Appellant contends that this Court's review of the record is erroneous, in that he timely filed his appellate brief. Appellant apparently refers to his response to the Court's second show-cause order, which response he filed on June 23, 2004. Appellant attached a copy of his appellate brief as an exhibit to that response. That response was, however, unfiled by an order filed on June 28, 2004, which order specifically indicated that the "appellate brief must be separately filed as its own document; it may not simply be attached as an exhibit to another

document." The response to the show-cause order was not thereafter refiled, and the appellate brief never was filed separately with the clerk. Thus, it is Appellant's review of the record that is in error.

Appellant also contends that on June 23, 2004, he attempted to separately file his appellate brief but the "Clerk would not file the Appellant's Brief until this Court ruled on the Appellant's Motion to Supplement the Record. Appellant's Brief was then "unfiled" but stamped on the back page as "Received" as of June 23, 2004 at 1:10 p.m." (Mot. for New Trial at 3.) The Court doubts that Appellant's recollection of events is accurate, inasmuch as this Court has specifically instructed its clerk never to refuse documents submitted for filing unless those documents constitute discovery material. In any event, Appellant has wholly failed to submit any evidence supporting his version of events, nor has he specifically identified the deputy clerk who he alleges refused to file his brief or submitted a copy of the brief that he alleges was received-stamped on the back. Consequently, the Court cannot conclude that its dismissal of this appeal was erroneous or constituted a miscarriage of justice. See *Int'l Bhd. of Teamsters v. Braniff Airways, Inc.*, 774 F.2d 1303, 1305 (5th Cir. 1985) (concluding that district court did not abuse its discretion when it dismissed a bankruptcy appeal due to appellant's failure to timely file its appellate brief).

It is, therefore, ORDERED that Appellant's Motion for New Trial [document number 19] is hereby DENIED.

SIGNED May, 2005.

5-4-05

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

APPENDIX C

Court of Appeals Decision
August 18, 2006
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In re Goldblatt,

No. 05-10747
IN THE MATTER OF: KENNETH ALLEN GOLDBLATT, DEBTOR,
KENNETH ALLEN GOLDBLATT, APPELLANT,
v.
CAREY EBERT, TRUSTEE, APPELLEE.

Appeal from United States District Court for the Northern
District of Texas No. 4:04-CV-337.

Per curiam
Unpublished Opinion
Summary Calendar
Before BARKSDALE, STEWART, and CLEMENT, Circuit Judges.

Kenneth A. Goldblatt challenges the determination of the district court that he failed to file his brief on appeal, and the resultant orders that dismissed his bankruptcy appeal, without prejudice, and denied his motion for new trial. We affirm.

I FACTUAL AND PROCEDURAL BACKGROUND

Goldblatt's appeal to the district court was docketed on May 4, 2004. On June 9, 2004, the

district court noted that the appellate brief had not yet been filed, and ordered that Goldblatt file his brief no later than June 23, 2004, in order to pursue his appeal. The order stated that failure to "timely and completely comply with this order" would result in dismissal.*fn2

The docket reveals that, on June 23, 2004, Goldblatt responded to the district court's order that the brief be filed. This response was unfiled by order of the district court on June 28, 2004. The notice of deficiency indicated that the brief must be separately filed as its own document and not attached as an exhibit to another document. The record contains only the first page of this response, stamped "UNFILED" over the June 23, 2004, 1:05 p.m., clerk of court stamp. On February 25, 2005, the district court dismissed Goldblatt's appeal, without prejudice, for failure to timely comply with Bankruptcy Rule 8006. The district court stated that Goldblatt's brief was due May 19, 2004, and, as of the February 2005 dismissal, the brief had not been filed.

Goldblatt appeals, contending that the district court erred in dismissing his appeal and in denying his motion for new trial because his brief was filed as a timely response to the district court's order that the brief be filed by June 23, 2004.

II. STANDARD OF REVIEW

In reviewing an action taken by a district court in its appellate role, we affirm unless the court has clearly abused its discretion. *In re Braniff Airways, Inc.*, 774 F.2d 1303, 1305 (5th Cir. 1985). Similarly, we affirm unless the district court abused its discretion in its administrative handling of a case, including its enforcement of the

local rules and its own orders. See *Macklin v. City of New Orleans*, 293 F.3d 237, 240 (5th Cir. 2002). "Dismissal is a penalty of last resort, to be imposed only after clear delay or contumacious conduct and a finding that lesser sanctions would not cure the problem". *Braniff*, 774 F.2d . at 1305. "[T]his court has held that, in reviewing a district court's dismissal of a bankruptcy appeal for non-jurisdictional defects under Federal Rule of Bankruptcy Procedure 8001(a), we should review the district court's action with attention to the prejudicial effect of delay on the appellees and the bona fides of the appellant." *In re: CPDC Inc.*, 221 F.3d 693, 698 (5th Cir. 2000) (internal quotation marks omitted) (quoting *Braniff*, 774 F.2d at 1304).

III. DISCUSSION

Bankruptcy Rule 8001(a) states, in pertinent part, that "[a]n appellant's failure to take any step other than timely filing a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court . . . deems appropriate, which may include dismissal of the appeal." The Federal Rules of Bankruptcy Procedure were amended in 1995 to state that "[a] local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a non-willful failure to comply with the requirement." Fed. R. Bankr. P. 8018(a)(2); 9029(a)(2). The plain language suggests that rules of form are just that – rules that require court submissions to be in a certain form. *El-Kaissi v. Martinaire, Inc.*, 2005 WL 2897055 *6 (S.D. Tex Nov. 3, 2005).

The purpose of this new language was "to protect against loss of rights in the enforcement of

local rules relating to matters of form." Fed. R. Bankr. P. 9029 Advisory Committee's Note. The language was narrowly drawn to cover only violations that are not willful and that involve local rules directed to matters of form. *Id.* This 1995 amendment to Bankruptcy Rule 8018 does not limit the court's power to impose substantive penalties upon a party for stubborn or repeated violations of a local rule by the party or its attorney. *Id.**fn3 Likewise, Rule 8018 does not affect the court's power to enforce local rules that involve more than mere matters of form, such as a requirement that a jury trial be demanded within a specified time period to avoid waiver of the right to a trial by jury. *Id.*

The notice of deficiency is a form on the same page as the order that unfiled Goldblatt's June 23, 2004 response. It has thirteen enumerated, printed violations, with a place by each number to check which violation(s) caused the deficiency. The thirteenth violation is "Other" and has space for a handwritten description of the deficiency.

The notice of deficiency indicated that Goldblatt's June 2004 response violated United States District Court, Northern District of Texas Local Rule (LR) 7.1(I) or 56.6(a). Handwriting on the notice strikes out the word "motion" and inserts the word "response." As altered, it reads "The response must include documentary or nondocumentary evidence in a separate appendix. See LR 7.1(I) or LR 56.6(a)." The violation is further explained by additional handwriting as "your appellate brief must be separately filed as its own document; it may not simply be attached as an exhibit to another document."

In deciding to dismiss the appeal and deny the motion for new trial, the district court relied on Goldblatt's failure to separately file the brief when he filed the response to the district court's order, even though the purpose of the response was to file the brief. The dismissal stated that Goldblatt's brief was over nine months late and that because this was not the first instance of his dilatoriness in prosecuting this appeal, the appeal should be dismissed. In the order denying the motion for new trial, the district court elaborated on the tardiness of the brief as follows:

> [Goldblatt] contends that this Court's review of the record is erroneous, in that he timely filed his appellate brief. [Goldblatt] apparently refers to his response to the Court's second show-cause order, which response he filed on June 23, 2004. [Goldblatt] attached a copy of his appellate brief as an exhibit to that response. That response was, however, unfiled by an order filed on June 28, 2004, which order specifically indicated that the appellate brief must be separately filed as its own document; it may not simply be attached as an exhibit to another document. The response to the show-cause order was not thereafter refiled, and the appellate brief never was filed separately with the clerk. Thus, it is [Goldblatt]'s review of the record that is in error.

Goldblatt did not file his brief timely according to Bankruptcy Rule 8009(a), though it appears his brief was filed as an attachment within the extension delay. Nevertheless, we find no abuse of the district court's discretion in dismissing the appeal.

Arguably, Goldblatt initially did not willfully fail to file his brief. The district court

acknowledged that the brief was filed on June 23, 2004, and the Trustee does not indicate that she did not receive the brief. That brief placed her on notice that the issue was whether the bankruptcy court erred by "refusing to compel the Trustee to abandon a claim for rent on commercial real estate that at all times relevant was a valuable asset of the bankruptcy estate or owned by Goldblatt."*fn4 Goldblatt did not refile the brief as ordered in the notice of deficiency. Goldblatt claims that the original record shows his March 2005 attempt to re-file the brief after the February 2005 dismissal, but that is of no moment: Goldblatt had from the June 2004 unfiling to the February 2005 dismissal for refiling, but did not refile during that time. While there was likely little or no prejudice to the Trustee from the delay between the May 2004 docketing of the case, and the June 2004 filing of the brief, we cannot say the same about the delay between the June 2004 unfiling and the alleged March 2005 attempt to refile the brief. It does not constitute an abuse of the district court's discretion to determine that Goldblatt's failure to refile the brief – after being told to do so – demonstrates a certain stubbornness or willfulness sufficient to warrant dismissal.

IV. CONCLUSION

Finding no abuse of discretion, we AFFIRM the district court's orders dismissing the appeal without prejudice and denying the motion for new trial. Costs shall be borne by the Appellant.

Opinion Footnotes

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*fn1 Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be

published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

*fn2 This was the district court's "second show cause order." The first was an order that directed Goldblatt to file certain transcripts and/or other evidence. Thus, the "first show cause order" is unrelated to the dismissal for failure to file the brief, and is not at issue herein.

*fn3 See also Fed. R. Bankr. P. 8018 Advisory Committee's Note ("This rule is similar to Rule 47 [of the Federal Rules of Appellate Procedure] and Rule 83 [of the Federal Rules of Civil Procedure]. Local rules governing procedure before the bankruptcy courts maybe promulgated under [Bankruptcy] Rule 9028."); Fed. R. Civ. P. 83 Advisory Committee's Note, 1995 Amendment:

Paragraph (2) is new. Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of form. For example, a party should not be deprived of a right to a jury trial because its attorney, unaware of – or forgetting – a local rule directing that jury demands be noted in the caption of the case, includes a jury demand only in the body of the pleading. The proscription of paragraph (2) is narrowly drawn – covering only violations attributable to non-willful failure to comply and only those involving local rules directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party if it or its attorney contumaciously or willfully violates a local rule, even one involving merely a matter of form. Nor does it affect the court's power to enforce local rules that involve more than mere matters of form – for example, a local rule requiring parties to identify evidentiary

matters relied upon to support or oppose motions for summary judgment.

*fn4 We note here only that an issue was stated in the brief. We make no finding whether this statement of the issue is sufficient, as that question is not before this court.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-10232
Summary Calendar

In The Matter Of: KENNETH ALLEN GOLDBLATT
Debtor
KENNETH ALLEN GOLDBLA
Appellant
v.
CAREY D EBERT, Trustee
Appellee

United States Court of Appeals
Fifth Circuit
FILED
October 31, 2007
Charles R. Fulbruge III
Clerk

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:06-CV-751

Before KING, DAVIS, and CLEMENT, Circuit Judges.

PER CURIAM:[1]

[1]Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Kenneth Goldblatt challenges the district court's dismissal of his untimely bankruptcy appeal. We AFFIRM.

No. 07-10232

This is Goldblatt's second appeal to this Court regarding the bankruptcy court's denial of his motions to compel a bankruptcy trustee to

abandon claims. Goldblatt's first appeal from the bankruptcy court was dismissed by the district court for failure to timely comply with Federal Rule of Bankruptcy Procedure 8006. This Court affirmed the district court's decision on August 18, 2006. *Goldblatt v. Ebert* (*In re Goldblatt*), 203 Fed. Appx. 515, 548 (5th Cir. 2006). On September 18, 2006, Goldblatt filed a motion for rehearing in the bankruptcy court which was denied on October 2, 2006. He filed a notice of appeal with the bankruptcy court on October 20, 2006. On January 16, 2007, the district court held a telephone hearing with the parties and Goldblatt's appeal was dismissed. The minutes of that hearing indicate that the appeal was dismissed for "untimeliness of, *inter alia*, bankruptcy appeal, designation of record on appeal, and filing of appellant brief. Goldblatt now claims the district court erred in dismissing his appeal.

We review actions taken by a district court in its appellate role for abuse of discretion. *Int'l Bhd. of Teamsters v. Braniff Airways, Inc.* (*In re Braniff Airways, Inc.*), 774 F.2d 1303, 1305 (5th Cir. 1985). "[This court has held that, in reviewing a district court's dismissal of a bankruptcy appeal for nonjurisdictional defects under Federal Rule of Bankruptcy Procedure 8001(a), we should review the district court's action with attention to the prejudicial effect of delay on the appellees and the bona fides of the appellant." *Zer-Ilan v. Frankford* (*In re CPDC Inc.*), 221 F.3d 693, 698 (5th Cir. 2000) (internal quotations omitted). However, "Jurisdictional questions are questions of law which are reviewed de novo." *Estate of Smith v. Commr of Internal Revenue*, 429 F.3d 533, 537 (5th Cir. 2005).

The Federal Bankruptcy Rules state that:

> An appeal from a judgment, order, or decree of a bankruptcy judge to a district court . . . shall be taken by filing a notice of appeal with the clerk within the time allowed by Rule 8002. An appellant's failure to take any step other than timely filing a notice of appeal does not affect the validity of the appeal. . . . FED. R. BANKR. P. 8001(a). Federal Rule of Bankruptcy Procedure 8002(a) requires that a "notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from." "The District Court lacks jurisdiction of an appeal that is not timely filed." *Robinson v. Robinson* (*In re Robinson*), 640 F.2d 737, 738 (5th Cir. 1981); see also *Rowles, Winston & Co. v. Morrow* (*In re Morrow*), 564 F.2d 189, 190 (5th Cir. 1977).

Goldblatt's motion for rehearing was denied on October 2, 2006. He filed a notice of appeal on October 20, 2006. Because Goldblatt did not file his notice of appeal within ten days of the entry of judgment, the district court lacked jurisdiction to hear his appeal. There is no need to review the district court's alternative bases for dismissal.

The district court's order dismissing the appeal is AFFIRMED.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 07 – 10232
In the Matter of: KENNETH ALLEN GOLDBLATT
Debtor

KENNETH ALLEN GOLDBLATT
Appellant
v.
CAREY D EBERT, Trustee
Appellee

U.S. COURT OF APPEALS
FILED
Nov 28 2007
CHARLES R. FULBRIDGE III
CLERK

Appeal from the United States District Court
for the
Northern District of Texas, Fort Worth

ON PETITION FOR REHEARING
AND REHEARING EN BANC

Before KING, DAVIS and CLEMENT, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. App. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.
( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R.

App. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.
( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:
Unite States Circuit Judge

E. B. Clement
United States Circuit Judge

APPENDIX F

NO. 07-10232
IN THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT COURT OF APPEALS

In The Matter of KENNETH A. GOLDBLATT
Debtor

KENNETH A. GOLDBLATT
APPELLANT
v.
CAREY EBERT, TRUSTEE
APPELLEE

APPELLANT'S PETITION FOR REHEARING
OR,
IN THE ALTERNATIVE, HEARING EN BANC

Frank P. Hernandez, Esq.
716 Wayne Avenue
Dallas, Texas
214-821-1213
Fax 214-821-1214
TBC#09516000
Attorney for Appellant

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW, Kenneth Allen Goldblatt, Appellant in the above-numbered and entitled cause and would respectfully show the Court the following:

The present panel has based its most recent decision on erroneous understanding of facts of the filling date of Appellant's previously denied Motion for Rehearing, and thereby is denying Appellant his day in court.

The panel's decision is based solely on the timing of the denial of Appellant's Motion for Rehearing in October 2006. However, the Court's own case file demonstrates that the Panel is either wrong in its understanding of the time frames involved in denial of Appellant's previous motion or is requiring the impossible of Appellant through its current decision. In either event, Appellant seeks a rehearing on his appeal so that justice can be done. A copy of the Panel's decision is attached as Exhibit A as required by the Court's rules.

While the Panel asserts that "Goldblatt's Motion for Rehearing was denied on October 2, 2006" the document shows that the "Judgment" was filed on August 18, 2006. The document face further shows that the document was not "ISSUED AS MANDATE" until "October 11, 2006". "A True Copy" stamp on the bottom of the page further identifies the designation by the "Clerk, U.S. Court of Appeals, Fifth Circuit" as having date-stamped the document on October 11, 2006. The document also shows that it was filed by the Clerk's Office of the Northern District of Texas on October 13, 2006, indicating that it was likely received by mail on that date. The page in question is shown in the image/illustration below:

ORIGINAL

United States Court of Appeals
Fifth Circuit

UNITED STATES COURT OF APPEALS

FILED
August 18, 2006

FOR THE FIFTH CIRCUIT

Charles R. Fulbruge III
Clerk

No. 05-10747
Summary Calendar

D.C. Docket No. 4:04-CV-337

In The Matter Of: KENNETH ALLEN GOLDBLATT

Debtor

KENNETH ALLEN GOLDBLATT

Appellant

v.

CAREY EBERT, Trustee

Appellee

U.S. DISTRICT COURT
NORTHERN DISTRICT
FILED
OCT 13 2006
CLERK, U.S. DISTRICT COURT
By _____ Deputy

Appeal from the United States District Court for the Northern District of Texas, Fort Worth.

Before BARKSDALE, STEWART, and CLEMENT, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that appellant pay to appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: OCT 11 2006

A True Copy
Attest

Clerk, U.S. Court of Appeals, Fifth Circuit

By: _____ Deputy

New Orleans, Louisiana

OCT 11 2006

Assuming Appellant could have acted on the date of issue by the Fifth Circuit – which is unlikely since he had absolutely no way of knowing the exact date the Court might choose to issue short of being mentally telepathic – his filing on October 20, 2006 demonstrates that, not only was he NOT LATE in filing his Notice of Appeal, but that he in fact made the filing quite expeditiously. Supposing he got notice of the

decision on the day of its issue, his filing was made NINE DAYS later – and timely in any event. And further supposing that Appellant received notice the same day as it was filed in the District Clerk's Office in Fort Worth, it would have been filed a timely SEVEN DAYS later.

ARGUMENT

Adjudication of the facts of this case on the merits will demonstrate that the improper valuation of the real estate that has been the subject matter of more than a decade of litigation has led to a miscarriage of justice that must be corrected by this Court.

"[C]ourts must remain flexible when reviewing failures of persons unfamiliar with administrative complexities to comply with procedural rules. We should not regard such rules as rigid jurisdictional prerequisites." *Price v. Southwestern Bell Tel. Co.*, 687 F.2d 74, 77 (5th Cir. 1982).

In the Fifth Circuit, the Court reviews actions taken by the district courts in their appellate role for abuse of discretion. *In re Braniff* Airways, Inc., 774 F.2d 1303, 1305 (5th Cir. 1985) (citing *Pyramid Mobile Homes, Inc. v. Speake*, 531 F.2d 743, 746 (5th Cir. 1976) (*per curiam*)). A district court abuses its discretion when its decision is based on an erroneous view of the law. *In re Sealed Appellant*, 194 F.3d 666, 670 (5th Cir. 1999) (citations omitted). Furthermore, the Fifth Circuit has held that, in reviewing a district court's dismissal of a bankruptcy appeal for non-jurisdictional defects under Federal Rule of Bankruptcy Procedure 8001(a), the 5th Circuit panel should "review the district court's action with attention to 'the prejudicial effect of delay on

the appellees and the bona fides of the appellant.'" *Braniff*, 774 F.2d at 1304 (citing *Pyramid* 531 F.2d at 746). *Zer-Ilan v. Frankford*, 221 F.3d 693, (5th Cir. 2000). In this case, the prejudicial effect on Appellant is significant, while the issue of delay – after thirteen years of continuous litigation and several years of adjudication of this single matter – is irrelevant to the issue.

Rule 8001(a) states that "[a]n appellant's failure to take any step other than timely filing a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court . . . deems appropriate, which may include dismissal of the appeal." As the language of the rule makes clear, only the failure to file a notice of appeal, which deprives the reviewing court of jurisdiction, mandates dismissal. In contrast, the district court does not invariably dismiss for breaches of other procedural rules, including Rule 8006. *In re Tampa Chain Co., Inc.*, 835 F.2d 54, 55 (2nd Cir. 1987) (*per curiam*). Rather, the court must exercise discretion and consider what sanctions are appropriate. [emphasis added] Dismissal is a harsh and drastic sanction that is not appropriate in all cases, even though it lies within the district court's discretion. In addition, when, as here, an appeal is dismissed because of an initial attorney error, the client is unduly punished for his attorney's mistakes. Editors' Comment, Norton Bankruptcy Rules at 523 ("While counsel for the appellant may be sanctioned, a dismissal of the appeal would unfairly penalize the client."); *In re Hill*, 775 F.2d 1385, 1387 (9th Cir. 1985) (*per curiam*) (The court commits an abuse of discretion when "the default was the fault of the attorneys and not the litigant, [y]et the impact of the sanction imposed is primarily against the client.").

In this case, the court never issued any sanctions against the attorney and at no time has either district court considered sanctions – or any other alternative but dismissal. This action has been dismissed twice by the district courts on procedural grounds that continue to deny Appellant a trial on the merits of the subject matter of this action. And in both instances, dismissal resulted from a mistake on the part of the courts and their functionaries, not Appellant or his counsel.

In the absence of evidence of prejudice or obstinately dilatory conduct, and given that the purpose of Rule 8006 has been satisfied, the Fifth Circuit has previously concluded that dismissal was not justified. *In re Winner Corp.*, 632 F.2d 658, 661 (6th Cir. 1980) (reinstating appeal when there was no evidence of bad faith). Following this teaching, the panel must reach the same conclusion on these facts.

There is no evidence in the instant appeal of either an intent to delay or obstinately dilatory conduct on the part of Appellant that could justify dismissal. *Fitzsimmons*, 920 F.2d at 1474 (finding that a district court was not required to consider other factors when appellants had exhibited "bad faith behavior"). Rather, the record establishes that Appellant timely filed his notice of appeal and record designation, and timely filed his Appellant's Brief in response to the District Court's Order to Show Cause, and complied with the rules of bankruptcy procedure with regard to all other aspects of prosecuting his appeal. Cf. *In re Champion*, 895 F.2d 490, 492 (8th Cir. 1990) (*per curiam*) (no abuse of discretion for dismissing appeal when appellant had not filed a designation of record excerpts or statement of issues nine months after filing of notice of appeal); *Greco v.*

Stubenberg, 859 F.2d 1401, 1403-04 (9th Cir. 1988) (no abuse of discretion for dismissing appeal when appellant's counsel repeatedly failed to order transcripts, misrepresented to court that transcripts had been ordered, and did not notify court of inability to do so for nine months); *Pyramid*, 531 F.2d at 746 ("[F]or over four months after filing its appeal appellant had made no effort to comply with the Rules."). None of those factors exist in this case.

Instead, there is abundant evidence on the record in the District Court to illustrate the error of the District Court's Order of Dismissal of Appellant's Appeal as an abuse of discretion because Appellant and his attorney both made good faith efforts to comply with the rules, and were thwarted by the actions (and apparent mistake) of a filing clerk in the filing (unfiling) of his Appellant's Brief. When this Court denied appeal without prejudice on that issue, and this Court affirmed, Appellant immediately filed his second, appeal (as he was free to do since the district court had dismissed the first appeal "without prejudice") in the district court, and now here.

First, it is clear from the record that Appellant timely and fully complied with the District Court's Order to Show Cause of June 9, 2004 by filing his Response to that Order on June 23, 2004 with the Appellant's Brief attached, and by attempting to file a separate copy of the Appellant's Brief at the very same time. A copy of that Brief (as separately filed) exists in the District Court's (and Appellant's) own file with the file stamp on the front page covered by a blank sticker, and a file stamp on the reverse of the back page showing it was received by the Clerk on June 23, 2004 at 1:10 p.m. Appellant is at a loss to

explain to this Court why the District Court has dismissed his appeal in the face of such evidence in the District Court's own file.

It is equally clear from the record that Appellant undoubtedly intended to file and prosecute his appeal in the District Court, and did so as diligently as possible under the circumstances. The dismissal of his appeal "without prejudice" to its re-filing was an erroneous and unnecessary action by the Court and an abuse of that court's discretion under Fifth Circuit law. In the interim, the case has been under continuous adjudication.

It is unclear from the record, however, whether Appellant's counsel ever received notice of the scheduling of filing of Appellant's second brief, and it is equally unclear from the record why Appellant's second appeal was dismissed by the district court. Either of these issues is sufficient reason to overrule the district court and reinstate this appeal.

At the very least, Appellant is entitled to have this Court remand this case back to the bankruptcy court for a hearing on the merits of the underlying subject matter of this action.

CONCLUSION

There is ample evidence in the record to show that Appellant has diligently prosecuted his appeal of this matter to obtain a hearing on the merits, and repeatedly has been denied that hearing at every level. Now Appellant is entitled to such hearing on the merits on the basis of new evidence that was never before available and that he diligently made a part of the record as soon as it became available and known to him.

Substantial evidence exists on the record that Appellant has been denied a hearing on the merits – not by any action or failure on his part or that of his counsel, but – by actions and procedures of the district court and its clerks that have resulted in denial of Appellant's rights to due process in direct contradiction of the teaching of this circuit, statute, case law and authorities.

Appellant wants this Court to reverse the district court's dismissal of his Appeal and remand the case either to the bankruptcy court or the district court for adjudication on the merits.

Respectfully submitted

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